Supreme Court, U.S.
FILED
96 108 JUL 1 1996
OFFICE OF THE

No. _____

In The
Supreme Court of the United States
October Term, 1996

DOROTHY HUSTON,

Petitioner,

v.

STATE OF TENNESSEE BOARD OF REGENTS
and
NASHVILLE STATE TECHNICAL INSTITUTE,

Respondents.

Petition For Writ of Certiorari
The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

William Kennerly Burger
Attorney for Petitioner
301 N. Spring St., P. O. Box 398
Murfreesboro, TN 37133-0398
(615) 896-4154

19pp

QUESTION PRESENTED

Plaintiff presents a prima facie Title VII racial discrimination claim, in which the trial and intermediate courts found the presumption to be rebutted by proof that the reasons for Plaintiff's termination were not pretextual.

The case involves the appropriateness of utilizing wholly subjective criteria in effecting a reduction in force of upper echelon employees.

A narrow issue of law is involved in the appeal of the case: In the context of a prima facie racial discrimination Title VII claim, may a Defendant/employer meet its burden of production, as a matter of law, where it has failed to offer any evidence at all justifying the business necessity of utilizing wholly subjective criteria in effecting a reduction in force?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW. 1

JURISDICTION 1

REASONS FOR GRANTING THE WRIT 2

I. THE SIXTH CIRCUIT APPELLATE OPINION DIRECTLY CONFLICTS WITH THE SUPREME COURT'S RULING IN WATSON V. FORT WORTH BANK & TRUST, 487 U.S. 977 (1988) AND LEAVES UNADDRESSED AND UNCLARIFIED THE NATURE OF THE EMPLOYER'S BURDEN OF PRODUCTION IN A "BUSINESS NECESSITY" DEFENSE WHERE PURELY SUBJECTIVE CRITERIA HAVE BEEN USED TO EFFECT A REDUCTION IN FORCE.

CONCLUSION 9

APPENDIX . . . . . App. 1

TABLE OF AUTHORITIES

Page

Cases

Bell v. AT&T,
936 F.2d 1507 (10th Cir. 1991). 8

Crawford v. Western Electric Co.,
745 F.2d 1373 (11th Cir. 1984). 9

Furnco Construction Co. v. Waters,
328 U.S. 567 (1978). 5

Little v. Master-Bilt Products, Inc.,
506 F.Supp 319 (N.D. Miss. 1980) . . 9

McDonald Douglas Corp. v. Green,
411 U.S. 792 S.Ct. (1973) 7

Mozee v. American Commercial Marine Service, Inc.,
940 F.2d 1036 (7th Cir. 1991) 7

Rogers v. International Paper Co.,
510 F.2d 1340 (8th Cir. 1975) 9

St. Mary's Honor Center v. Hicks,
113 S.Ct. 2742 (1993) 5

Wards Cove Packing Co. v. Antonio,
490 U.S. 642 (1989) 6

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988). 2,6

PETITION FOR WRIT OF CERTIORARI

The Plaintiff, Dr. Dorothy W. Huston, respectfully requests that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, case number 94-6579, filed April 22, 1996, for the purpose of resolving the conflict in appellate level decisions which address the employer/defendant's "burden of production" in upper echelon subjective practice cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is unpublished by order of the Sixth Circuit. It is reprinted in Appendix A hereto ("App. A") at page A-1.

JURISDICTION

Appellant Dr. Dorothy W. Huston presented her claim in the United States District for the Middle District of Tennessee based upon the provision of 42 U.S.C. §2000e-5. Jurisdiction of the United States Sixth Circuit Court of Appeals was based upon the provisions of 28 U.S.C. §1291, upon the Appellant's assertion that a final order had been entered in the District Court proceedings dismissing the Appellant's claim, and terminating all issues presented in the litigation on the merits. The District Court's order of dismissal was entered November 8, 1994, and a timely notice of appeal was thereafter filed by the Appellant Dr. Dorothy W. Huston on December 1, 1994. The United States Sixth Circuit Court of Appeals filed an opinion and order affirming the dismissal on April 22, 1996.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT APPELLATE OPINION DIRECTLY CONFLICTS WITH THE SUPREME COURT'S RULING IN WATSON V. FORT WORTH BANK & TRUST, 487 U.S. 977 (1988) AND LEAVES UNADDRESSED AND UNCLARIFIED THE NATURE OF THE EMPLOYER'S BURDEN OF PRODUCTION IN A "BUSINESS NECESSITY" DEFENSE WHERE PURELY SUBJECTIVE CRITERIA HAVE BEEN USED TO EFFECT A REDUCTION IN FORCE.

Petitioner is a 36 year old African-American female, with a doctorate education from Ohio State University. In 1988, the Petitioner was recruited for employment within the Tennessee higher education system, known as the Tennessee Board of Regents, from her previous employment at Ohio Wesleyan University, where she had worked as an affirmative action officer. The Petitioner was approached by a special assistant to the Chancellor for the Tennessee Board of Regents seeking her employment within the Tennessee system incidental to the implementation of the "Geier" court-ordered mandate for the desegregation of the higher education system in Tennessee. In December, 1989 the Petitioner was nominated for a position at one of the forty subsidiary institutions of the Tennessee Board of Regents, Nashville State Technical Institute, and thereafter assumed the positions of Assistant Dean of Admissions and Records, and Affirmative Action Officer. The school, Nashville State Technical Institute, maintains an approximate 15% minority enrollment.

Of the approximate twenty senior, upper-level administrators at Nashville State Technical Institute in January, 1990 only one other upper echelon employee was African American.

The Petitioner's competence in the performance of her duties was never challenged, and was, in fact, repeatedly complimented. Following the departure of the school's African American President (the only other minority administrator) the Appellant encountered substantial resistance in the performance of her duties.

In the spring of 1992, the Petitioner was terminated from her position for alleged "difficult financial times" at the school. At the time of her departure, the Petitioner was the only upper echelon, senior-level employee eliminated as a result of the purported budget reduction. Petitioner's termination left in place an entirely white upper echelon staff of approximately 23 individuals, at a school with 15% minority enrollment.

At the time of the Petitioner's termination, the Respondent Tennessee Board of Regents had in effect a written personnel policy which mandated the school's development of "specific written criteria" which would take into account racial balance and affirmative action goals at the school, prior to effecting any budgetary-based reduction in force.

It is not factually disputed that, when an ad hoc committee met and made the decision to terminate the Petitioner, the written, objective guidelines were entirely disregarded, and no written criteria were prepared prior to effecting the decision. Instead, the Defendant maintains that it had legitimate budget problems which forced the removal

of the Petitioner, and that, despite the admitted disregard of its written objective criteria, the appropriate points were considered by the committee when Dr. Huston was fired.

Simply stated, the employer/Defendant has defended the case by asserting that it had a legitimate "business necessity" for utilizing purely subjective criteria, and both the trial court and Sixth Circuit Court of Appeals have accepted the Defendant's assertion that proof of claimed budgetary problems properly rebutted the prima facie showing of racial discrimination which arose from the elimination of the only senior-level African American from the upper echelon staff of 23. Proof regarding the budgetary constraints was sharply contested, particularly in view of the fact that new employees were hired in the subsequent year, and huge raises were granted to the Board of Regents' officials in the following year. (It was undisputed that the Petitioner was hired during a year of budget deficit, and the year following her termination reflected a surplus).

The Petitioner respectfully insists that the lower courts have misperceived and misapplied the narrow legal standard involved in rebutting the presumption, based on unsettled and conflicting interpretations of the law in such cases. It is the contention of the Petitioner that, in prima facie discrimination claims involving upper echelon, management level positions, wholly subjective criteria may not be utilized in effecting a reduction in force, unless a clear business necessity can be demonstrated by the employers. It is not the business necessity related to the alleged underlying budget problem, but, instead, the business necessity behind the use of the subjective criteria which must be justified.

Otherwise stated, in order to meet its threshold "burden of production" the Defendant must offer a legitimate

business necessity for the use of subjective criteria, and may not meet its burden of production by offering an excuse based upon money shortages.

In Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) this court held that, particularly where a historical pattern of racial discrimination has been shown (as in the present case) the defendant/employer must offer legitimate business-related reasons for the practice or procedure which is challenged, and that the business wisdom of the ultimate objective is not the determinative issue.

In St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993) this court held that, in a Title VII prima facie context, where the presumption of discrimination is raised, the Defendant, as a matter of law in order to defeat the Petitioner's claim, must meet its burden of production by offering legitimate non-discriminatory reasons for the personnel practice which is at issue (in this case, the ignoring of a personnel policy requiring written, objective standards, in favor of a purely subjective consideration), and may not simply offer proof that there were legitimate budget considerations. It is the personnel practice or procedure which must be justified by proof of business necessity, or that burden of production fails, and the Plaintiff is entitled to judgment as a matter of law.

In the present case the Defendant offered absolutely no proof whatsoever of any "business necessity" for its decision to disregard its own written, objective personnel policies in favor of the ad hoc committee's purely subjective consideration of budgetary reasons which led to the elimination of the only African American employee on a staff of more than 20.

It is not necessary that Dr. Huston elect to present her claim exclusively on the disparate treatment or disparate impact model. Dr. Huston, in presenting evidence regarding a relatively small group of upper echelon employees, faced the same dilemma as that experienced by the Plaintiff in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), where the employer had failed to develop any precise or formal selection criteria for effecting promotions at a bank which maintained approximately 80 employees. In that case, the bank had not developed any precise or formal criteria for evaluating candidates or promotion, and instead relied upon the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. 487 U.S. 977, at page 982. In Watson, as in the present case, the absence of any minority representation in upper echelon positions created a prima facie case of employment discrimination. 487 U.S. 988, at 983. The lower courts found that the bank presented legitimate and nondiscriminatory reasons, from a factual point of view, for each of the challenged promotion decisions, and that decision was affirmed by the Fifth Circuit United States Court of Appeals. Later, in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) this court affirms the defendant/employer's duty to present a "business necessity" justification for subjective personnel practices in order to meet its burden of production in a prima facie case.

The decision in Watson permits analysis of subjective or discretionary employment practices, in upper echelon positions, under both the disparate impact and disparate treatment methods. Where the effect of a facially neutral employment practice, effected with nondiscriminatory intent, results in racial discrimination, and the employer offers no legitimate reason for use of the purely subjective practice, it has failed in its burden of production, and the petitioner is

entitled to judgment as a matter of law.

This court's decisions in St. Mary's and Watson have not been uniformly and clearly applied at the trial or intermediate appellate level.

Shortly after this Court's announcement of its decision in the case of McDonald Douglas Corp. v. Green, 411 U.S. 792, S.Ct., (1973), a Columbia Law Review article entitled "Title VII and Employment Discrimination in 'Upper Level' Jobs" appeared in a December, 1973 article (Volume 73 at Number 8). The central observation of that article addresses the use of subjective procedures in effecting personnel decisions in upper echelon positions and the inherently suspect results which arise, from the complete absence of minority representation in a defendant/employer's upper echelon work force. While recognizing that business necessity may, in certain circumstances, justify the use of wholly subjective criteria in those personnel decisions, the article emphasizes that the employer is under the duty, when challenged, to offer legitimate rational reasons for the use of the purely subjective practice, and that, due to the inherent potential for misconduct in effecting such subjective decisions, the courts should closely scrutinize the employer's reasons for the practice or procedure.

Mozee v. American Commercial Marine Service, Inc., 940 F.2d 1036 (7th Cir. 1991) involves the Seventh Circuit's review of an employer's attempted defense of subjective practices in administering discipline and discharge policies, and aptly summarizes the central issue urged by the Petitioner in the present application:

> "In subjective practice cases, plaintiffs argue that it is the very subjectivity of the step in the

> employment process -- taking unquantifiable attributes into account -- that causes the discrimination. We allow challenges to such practices because of the unfairness in permitting an employer to perpetuate discriminatory effects by relying for discriminatory results on the individual biases of its managers. Watson, 48 U.S. at 990-91, 108 S.Ct. at 2786-87. It is thus the very subjectivity of the practice that plaintiffs seek to eliminate. In order to sustain a subjective practice through a business necessity defense, therefore, an employer would have to argue that the subjectivity of the step is job-related -- in other words that something about the position requires the selector to make a subjective evaluation of the applicant's abilities." 940 F.2d 1037, at page 1050.

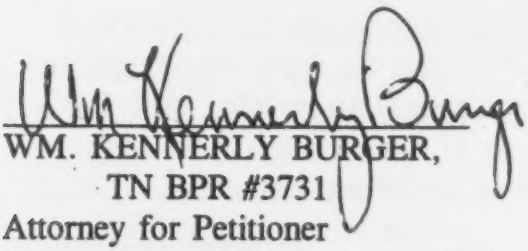
The Tenth Circuit United States Court of Appeals, in Bell v. AT&T, 946 F.2d 1507 (10th Cir. 1991) addressed a Title VII reduction in force in which the employer attempted to meet its burden of production by offering proof of facts supporting the rationality of its purely subject decision. In ultimately rejecting that attempt, the court emphasized that it is the business practice itself (of creating certain work groups) which must be justified by business necessity, and that the underlying business wisdom of the decision is not actually at issue. The Tenth Circuit, accordingly, rejects the argument that a managerial position may be eliminated in a reduction in force, based upon purely subjective criteria, where the defendant offers no evidence of any business-related justification for the personnel practice itself. The existence of legitimate money problems is not truly at issue.

Other intermediate appellate cases which have considered the burden of production in upper echelon employment practice cases include Crawford v. Western Electric Co., 745 F.2d 1373 (11th Cir. 1984); Little v. Master-Bilt Products, Inc. 506 F.Supp 319 (N.D. Miss. 1980); and an early Eighth Circuit opinion in Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975). Each of those rulings is in conflict with the Sixth Circuit's ruling in the present matter.

CONCLUSION

Saving money for the tax payers of Tennessee is a worthy endeavor for the Defendants. However, for the reasons outlined above, the petition for writ of certiorari should be granted to review the decisions below, because those courts have accepted the employer's completely subjective determination that the only minority representation in its upper echelon staff of 23 persons should be the individual fired in an attempt to save money. In a Title VII prima facie racial discrimination case, the employer may not meet its burden of production, as a matter of law, unless it offers legitimate "business necessity" reasons for the practice or procedure utilized in effecting the questioned personnel decision. The underlying wisdom of the decision is not directly at issue. The threshold issue in the present case centers upon the Defendant/employer's failure to offer any reasons whatsoever, related to any business necessity, which would have justified its disregard of its own written, objective personnel policies, in favor of a purely subjective approach to effecting a reduction in force of its upper echelon staff.

Respectfully submitted,



WM. KENNERLY BURGER,
TN BPR #3731
Attorney for Petitioner
301 N. Spring St., P. O. Box 398
Murfreesboro, TN 37133-0398
(615) 896-4154

APPENDIX A

DOROTHY HUSTON,
Plaintiff-Appellant,
v.
TENNESSEE STATE BOARD OF REGENTS
and
NASHVILLE STATE TECHNICAL INSTITUTE,
Defendants-Appellees.

No. 94-6579

United States Court of Appeals, Sixth Circuit
April 22, 1996. ORDER AND JUDGMENT

PER CURIAM. This is an appeal from a judgment for the defendants in a case brought under Title VII of the Civil Rights Act of 1964. After a bench trial, the district judge concluded that although the plaintiff had made out a prima facie case of a racially-based termination of employment, she failed to prove that the defendants' proffered justification -- a reduction in force prompted by legitimate budgetary considerations -- was a mere pretext.

It is undisputed that the criteria used by the defendants in implementing the reduction in force had not been reduced to writing, as required by an internal guideline. The plaintiff contends that this circumstance precludes the defendants, as a matter of law, from prevailing on their affirmative defense. She also contends that the failure to follow the guideline had a "disparate impact" upon her. We do not find either of these contentions persuasive, and we shall affirm the judgment of the district court.

In January of 1990 the plaintiff, Dr. Dorothy Huston, was hired for the dual position of Assistant Dean for Admissions and Records and Affirmative Action Officer at defendant Nashville State Technical Institute, an institution under the control of defendant Tennessee State Board of Regents. The responsibilities of the assistant deanship accounted for about 70 percent of the plaintiff's time, and the affirmative action responsibilities the remaining 30 percent. In the fall of 1991, in the midst of severe budgetary problems, the interim president of the university formed a committee to recommend ways to reduce spending. As a result of the committee's recommendations, the plaintiff's position -- like the positions of eleven lower level employees -- was eliminated in May of 1992.

The plaintiff's trial evidence included testimony from two administrative officials to the effect that the institution lacked a commitment to diversity; testimony by Dr. Houston that she experienced resistance from other administrators in her efforts to increase faculty and student minority participation in school activities; evidence that Dr. Huston was denied an evaluation by her primary supervisor despite a specific request therefor; and evidence that at the time of her discharge Dr. Huston was the only black senior level administrative employee, while hers was the only administrative position eliminated. This, the court found, sufficed to establish a prima facie case of racially-based discrimination.

Applying the burden-shifting approach developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the court found that the presumption created by the prima facie case was rebutted by the defendant's evidence of a legitimate need for the reduction in force. In this regard the court found that the university was suffering severe financial

difficulties. At the time the committee was formed there had been budget deficits in each of the last three years, and a deficit was projected for the 1991-1992 fiscal year as well.

The plaintiff could not show that the defendants' proffered justification was a mere pretext, the court found. It is true that the final figures for 1992-1992 reflected a budget surplus. The surplus was only achieved, however, after the administration had taken actions to freeze expenditures and to cut costs. It was also true that certain Tennessee State Board of Regents personnel received substantial salary increases in the eighteen months following the plaintiff's discharge. But the increases did not support the plaintiff's argument, the court explained, because the salaries of personnel directly under the Board of Regents were funded under an appropriations process that was separate from the process through which the plaintiff's position was funded.

The court found the plaintiff's other allegations of adverse treatment equally unconvincing. For example, the reason the plaintiff was not given a performance evaluation by her direct supervisor was not because of any discriminatory animus, but because her supervisor believed that she was to receive such an evaluation from the university president. Nor was it determinative that the university had not fully complied with a Tennessee State Board of Regents' policy requiring specific written criteria for the elimination of positions. The policy provided as follows:

> "Each institution or school shall develop a consistent and equitable method of notifying and terminating non-faculty employees in the

> event that a reduction in force, reorganization or elimination of any occupational classification within a unit becomes necessary. The method should include a review of the institution's or school's operations, identification of the functional area(s) affected, a review of the budgetary implications involved, and the development of the specific written criteria to be used in identifying the duties that will be reassigned and/or eliminated in the event of a reduction." (Emphasis supplied.)

The court found that although the committee did not reduce its criteria to writing, the procedure was followed in all other respects. The committee, the court explained, determined that to achieve savings it was necessary to reduce recurring costs, such as administrative personnel costs. Testimony at trial established that the committee had used a "function" approach to determine which positions should be eliminated. The committee sought to target those positions that were "nonessential," including positions the responsibilities of which could be absorbed by other employees. The court concluded that the plaintiff's position was one that basically entailed the supervision of department heads, and thus could be eliminated without adversely affecting direct services to students. Another dean was able to take over the plaintiff's personnel duties, and the plaintiff's affirmative action responsibilities were shifted to another administrator.

II

We do not find the district court's factual findings to be clearly erroneous, and the plaintiff does not contend they

were. The plaintiff argues, rather, that as a matter of law a defendant can never justify a discharge when it has failed to follow its own guidelines and has utilized a "subjective" procedure. We disagree. Certainly the fact that an employer has filed to follow internal guidelines may be evidence that a proffered explanation is a mere pretext. By itself, however, such a fact is not necessarily sufficient to establish pretext. This is particularly true here, where the trial court found that the committee followed the substance of the guidelines and only erred in failing to put its criteria in writing.

The plaintiff also argues that this is a disparate impact case, lie Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), and the defendants bear the burden of establishing a business necessity for disregarding their own procedures. But this is not a disparate impact case. The plaintiff's evidence at trial focused upon alleged discriminatory acts directed primarily at the plaintiff. The plaintiff did not allege that a facially neutral policy of the defendants had a disparate impact upon minority employees.

AFFIRMED.